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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Alfred E. Ehm, Petitioner

v.

National Railroad Passenger Corporation

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alfred E. Ehm, *pro se*
170 Carousel Drive
San Antonio, Texas 78227
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QUESTIONS PRESENTED

1. May a district court properly decline to carry out its duty as the statutorily designated enforcement arm of the Freedom of Information and the Government in the Sunshine Act, 5 U.S.C. §§ 552(a)(4)(B) and 552b(g)-(h)?

2. May Amtrak, or any "agency" for that matter, lawfully refuse to comply with any of the Freedom of Information Act's *Federal Register* publication mandates, 5 U.S.C. § 552(a)(1)(A)-(E)?

3. May Amtrak lawfully exempt itself from the applicability of the Government in the Sunshine Act on the basis of an implied repeal of the controlling definitions of "agency" given by 5 U.S.C. §§ 552(e) and 552b(a)(1)?

4. May a district court lawfully declare 31 U.S.C. § 3526(d), which provides for the conclusiveness of all Comptroller General's decision on the executive branch of the federal government, to be of no force and effect in respect to Amtrak?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Alfred E. Ehm, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit entered in this matter on March 23, 1984.

OPINIONS BELOW

The memorandum of the court of appeals whose judgment is herein sought to be reviewed is reprinted in Appendix A, *infra*, pp. A-1 to A-2. The final orders of the U.S. District Court for the District of Columbia are also printed in Appendix A, *infra*, pp. A-3 to A-4.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1984. A timely petition for rehearing was denied on May 9, 1984. Appendix A, *infra*, p. A-7. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These two cases involve-

1. The concept of equal protection of the laws inherent in the due process of law guaranteed every citizen of the State of Texas by the fifth amendment to the Constitution of the United States, which provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without *due process of law* . . ." (emphasis added).

2. The *Federal Register* publication mandates of the Freedom of Information Act, 5 U.S.C. § 552(a)(1); the "public notice and comment" provision of the Rail Passenger Service

Act, 45 U.S.C. § 564(c)(1)(E); 44 U S.C. § 1505 (a)-(b), which set out the classes of documents required to be published in the *Federal Register*; 44 U.S.C. § 1508, which pertains to notices of opportunity to be heard, and 44 U.S.C § 1510(a), which lists the classes of documents required to be published in the *Code of Federal Regulations*. Appendix B, *infra*, pp. A-8 to A-12.

3. The two definitions of "agency," which conjunctively govern the applicability of the Government in the Sunshine Act, 5 U.S.C. §§ 552(e) and 552b(a)(1). Appendix B, *infra*, p. A-9.

4. 31 U.S.C. § 3526(d), which provides for the conclusiveness of all Comptroller General's decisions on the executive branch of the federal government. Appendix B, *infra*, pp. A-12 to A-13.

5. The summary of decision B-114829 rendered by the Comptroller General on Sep. 8, 1978. 57 Comp. Gen. 773. Appendix B, *infra*, pp. A-13 to A-14.

STATEMENT OF THE CASES

The first case is an action brought by Ehm on April 4, 1983, pursuant to 5 U.S.C. § 552(a)(4)(B). The complaint sought to compel Amtrak to comply with certain of the Freedom of Information Act's *Federal Register* publication mandates, in particular 5 U.S.C. § 552 (a)(1)(B),(C), and (E). The *Federal Register* notices in question pertain to service additions and discontinuances and inform the public of the opportunity to be heard, as provided for by 45 U.S.C § 564(c)(1)(E) and 44 U.S.C. § 1508.

The second case is an action brought by Ehm on May 6, 1983, pursuant to 5 U.S.C. § 552b (g)-(h). The complaint sought to compel Amtrak's board of directors to comply with the Government in the Sunshine Act's *Federal Register* publication and rule-making mandates, as provided for by 5 U.S.C. § 552b (e) (3) and (g), and collaterally by 5 U.S.C. § 552(a)(1)(A)-(E), and 44 U.S.C. §§ 1505 and 1510.

THE FOIA CASE

On Jan. 24, 1983, after having seen a report in the press that Amtrak intended to commence auto-ferrying service between Virginia and Florida, Ehm requested Amtrak to comply with 5 U.S.C § 552(a)(1) by promptly publishing in the *Federal Register* a notice containing the pertinent facts of the project and informing the public of its right to comment. Amtrak rejected Ehm's request twenty days later on the ground that it did not "constitute a valid FOIA request."

Having then in his possession a number of letters informing him that Amtrak did not intend to respond to *any* of his FOIA requests, and having by then been subject to a blanket denial of his FOIA requests for a year and a half, Ehm on March 18, 1983, notified Amtrak's multi-member head of his intent to bring suit, *if* the agency refused to comply with his Jan. 24 FOIA request. Amtrak's board of directors did not reply and Ehm, therefore, filed his complaint for injunctive relief on April 4.

Amtrak responded to the suit by moving for dismissal on the grounds that the court lacked subject matter jurisdiction, the complaint failed to state a claim upon which relief could be granted, and Ehm had failed to exhaust his administrative remedies. To cure what was technically a failure to comply with the provisions of 5 U.S.C. § 552(a)(6)(A)(ii), Ehm on May 9 filed a formal appeal from the denial of his FOIA request. Amtrak's general counsel denied the appeal on May 27 for the reason that Ehm's Jan. 24 request did not constitute a valid FOIA request and the additional reason that the appeal was untimely.

On June 6, 1983, following a brief hearing in the course of which the matter of Ehm's alleged failure to exhaust his administrative remedies was not even mentioned, the district court dismissed the complaint "due to plaintiff's failure to exhaust his administrative remedies." Appendix A, *infra*, p. A-3.

The court of appeals did not address the correctness of the district court's finding that Ehm had failed to exhaust his administrative remedies, but held instead that Ehm's FOIA of Jan. 24, 1983, " did not seek the release of information . . . , [but] appears in reality to have been an attempt to compel Amtrak to engage in informal Administrative Procedure Act rulemaking." Appendix A, *infra*, p. A-1.

THE SUNSHINE ACT CASE

Subsection (g) of the Government in the Sunshine Act provides that every agency subject to the Act must publish in the *Federal Register*, pursuant to the "public notice and comment" provisions of 5 U.S.C. § 553, regulations implementing the requirements of subsections (b) through (f) of the Act. Having determined that Amtrak had not promulgated these statutorily mandated regulations, Ehm on Aug. 27, 1981, petitioned Amtrak under 5 U.S.C. §§ 553 (e) and 552 (a) (1), as well as 44 U.S.C. § 1505, to promptly publish such rules in the *Federal Register* and the *Code of Federal Regulations*. Amtrak acknowledged receipt of the petition, but took no action. Since the rules in question collaterally constituted "information" required, by paragraph (a)(1) of the Freedom of Information Act, to be currently published in the *Federal Register*, Ehm on Nov. 3, 1981, resubmitted his petition in the form of an FOIA request. Amtrak replied to this and two other requests by informing Ehm on Nov. 17 that it did not intend to respond to those three requests, nor "to any and all future FOIA requests."

Paragraph (e)(3) of the Sunshine Act requires that a notice of the time, place, and subject matter of any meeting of Amtrak's board of directors be printed in the *Federal Register* at least seven days prior to each meeting. Amtrak gave notice at 42 Fed. Reg. 13635 (March 11, 1977) of its intention to comply with this provision and in fact published these Sunshine Act meeting notices commencing in April 1977. On March 12, 1982, however, Amtrak announced by notice at 47 Fed. Reg. 10932 that it would no longer publish such notices in the *Federal Register*. The last "Sunshine Act notice" appeared, thus, at 47 Fed. Reg. 7047 (Feb. 17, 1982).

Because the Sunshine Act meeting notices collaterally constituted "information" of the type required by 5 U.S.C. § 552(a)(1) to be currently published in the *Federal Register*, Ehm on April 2, 1982, petitioned the U.S. District Court for the Western District of Texas under the Freedom of Information Act to temporarily restrain the Amtrak boark of directors from not printing the meeting notices in the *Federal Register*. The court denied Ehm's motion on Feb. 17, 1983,

on the grounds that 5 U.S.C. § 552(a)(1)(A) and (E) did not apply and that a suit under the Sunshine Act was required to compel Amtrak to comply with the provisions of 5 U.S.C. § 552b (e) (3).

Ehm, therefore, petitioned the district court for the District of Columbia on May 6, 1983, for an order directing Amtrak to comply with the provisions of 5 U.S.C. § 552b(e)(3) and (g).

Amtrak responded to the suit by moving for dismissal on the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief could be granted. On July 25, 1983, the district court ruled that Amtrak is not subject to the Sunshine Act because it is not an "agency" as defined in 5 U.S.C. §§ 552(e) and 552b(a)(1). Appendix A, *infra*, p. A-4. The court did so without taking any evidence and without complying with subsection 552b(h)(1), which provides that the burden of proof is on the agency to sustain its action. The court of appeals affirmed and found additionally that the appeal was frivilous.

In arguing that Amtrak is subject to the Sunshine Act because it is an "agency" as defined in 5 U.S.C. §§ 552(e) and 552b(a)(1) and because of clearly expressed congressional intent to that effect, Ehm relied upon Comptroller General's decision B-114829, which possesses, pursuant to 31 U.S.C. § 3526, the force and effect of law and is *conclusive* on Amtrak. Appendix B, *infra*, p. A-13. Amtrak countered that the decision is erroneous as a matter of law and that the corporation is not subject to the decision because it is not a component of the executive branch of the government. All of Ehm's urgings that decision B-114829 is binding and conclusive on Amtrak because of the mandate of subsection 3526(d) were entirely disregarded by both the trial and the appellate court.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Confirm that a District Court May not Decline to Enforce the Freedom of Information and the Government in the Sunshine Act

As this Court noted in *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 13, 19 (1973), the Congress saw fit to designate the district courts the "enforcement arm" of the Freedom of Information Act, by giving them jurisdiction to enjoin an agency from withholding agency records, to order the production of agency records improperly withheld, and to grant other equitable relief. 5 U.S.C. § 552(a)(4)(B). The same is true of the Government in the Sunshine Act, the only difference being a single exception in which original jurisdiction is vested in the District of Columbia Circuit. 5 U.S.C. § 552b(g)-(i). Thus, both acts not only grant every "person" certain rights and immunities, but also provide for a practical and speedy means to vindicate such rights and immunities.

If a person then turns to a district court to vindicate a right granted him by these two statutes and the court in effect declines to carry out its statutory duty of enforcing the mandates of these acts, the result is that 1) the congressional purposes of these laws are thwarted, 2) no other adequate specific remedy save maybe an application for an extraordinary writ of mandamus is available, 3) the person is unlawfully deprived of a right granted him by an act of Congress, and (4) the injured person is unconstitutionally denied his right to the equal protection of the laws implied in the "due process" clause of the fifth amendment.

It appears that the question whether a district court may decline to carry out its statutory function as the enforcement arm of the FOIA and Sunshine Act has not come before this court. A case in point, in which the court of appeals held that a district court may not evade the responsibility for determining the validity and extent of an agency's claims for exemption, was brought before this Court on an application for a

writ, but was not accepted. *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970). A number of cases set out and confirm the duties of the district courts in respect to enforcing the FOIA's objective of disclosure, but all are lower court decisions: *e.g., Marks v. CIA*, 590 F.2d 997 (D.C. Cir. 1978); *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); *Schwartz v. IRS*, 511 F.2d 1303, 1306 (D.C. Cir. 1975); *Tax Analysts and Advisors v. IRS*, 362 F.Supp. 1298, 1303 (D.D.C. 1973), *modified in part and remanded*, 505 F.2d 350 (D.C. Cir. 1974); *Theriault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974), *on remand*, 395 F. Supp. 637, 641 (C.D. Cal. 1974); *Fisher v. Renegotiation Board*, 473 F.2nd 109, 112, 114 (D.C. Cir. 1972), *on remand*, 355 F.Supp. 1171 (D.D.C. 1973).

The Sunshine Act shares with the FOIA and the Equal Access to Justice Act the unique provision that the agency involved must shoulder the burden to sustain its action. 5 U.S.C. §§ 552(a)(4)(B) and 552b(h)(1), 28 U.S.C. § 2412(d). *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 13 (1973); *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 352 (1979); *Hoang Ha v. Schweiker*, 541 F. Supp. 711, 713 (N.D. Cal. 1982). The reason for this shift in the burden of proof is the fact, according to the FOIA's legislative history, that the complainant has no way of knowing what the actual reasons for nondisclosure or noncompliance are. The defendant agency must, therefore, clearly set forth the grounds on which it acted. For, if the court is to test an agency's action on the basis upon which the action purports to rest, that basis must be known.

The Sunshine Act's provision that "[t]he burden is on the defendant to sustain his action" is, in import and effect, identical to the provision of the FOIA that "the burden is on the agency to sustain its action." The latter language has generally been construed by the courts to mean that the agency must show, by sworn testimony or publicly filed affidavit, what the legal basis of its action is and how its position accords with the substantive provisions of the FOIA.

The Amtrak directors were, consequently, required by law to

demonstrate to the trial court, by sworn oral testimony in open court or by detailed affidavit entered into the record, that 1) the FOIA does not require them to publish in the *Federal Register* the notices of opportunity to be heard mandated by 45 U.S.C. § 564(c)(1)(E) and 44 U.S.C. § 1508, and 2) they are not now, and were never by the Congress intended to be, subject to the Sunshine Act. The district court not only disregarded this critical requirement, but even declined to permit Ehm to offer evidence in support of his contention that the Amtrak board may not refuse to publish in the *Federal Register* the matters at issue in the two suits.

Because the burden is on the Amtrak directors to establish their right to exempt themselves from compliance with the Sunshine Act's and FOIA's *Federal Register* publication mandates, this case should have been remanded to the district court with the specific instruction that the board be ordered to supply to the court sufficient information, in the form of a specific and nonconclusory affidavit, so as to allow the trial court to make a reasonable determination that the Amtrak directors are correct. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980), 54 A.L.R. Fed. 256, 266 (1981). The *Vaughn*-affidavit is required to be in substantial compliance with the minimal standards set out *Mead Data Central, Inc. v. U.S. Department of the Air Force*, 566 F.2d 242, 251 (1977). As was pointed out in *Mead* in respect to the FOIA, these burdens may be avoided at the option of the Amtrak directors through immediate compliance with the pertinent provisions of the FOIA and Sunshine Act.

The Amtrak board maintained in a case brought in 1981 under the Privacy Act of 1974, 5 U.S.C. § 552a, that Amtrak is *not* subject to that Act because it is in fact a private corporation, *i.e.*, a "person" as defined in 5 U.S.C. § 551(2). They abandoned this defense in the Sunshine Act suit and argued instead that subtitle F of Pub. L. No. 97-35, 95 Stat. 689 (Aug. 13, 1981), the Amtrak Improvement Act of 1981, *repealed* 5 U.S.C. §§ 552(e) and 552b(a)(1), the controlling definitions of "agency" pursuant to which they had hitherto considered themselves to be subject to the "open meeting" law.

Because the trial court declined to force them to bear their burden of proof, by submitting a detailed and specific affidavit in which they described and justified the legal basis of their claim, they were able to avoid having to admit that they had partially compiled with the Sunshine Act for a period of five years.

The only Sunshine Act case on point appears to be *A.G. Becker Incorporated v. Board of Governors of Federal Reserve System*, 502 F.Supp. 378, 385 (D.D.C. 1980), which held in respect to the "notice" requirements of 5 U.S.C. § 552b (e) that the board was required to "submit detailed, specific affidavits describing with sufficient justification the basis for [their] claim, and not rest on conclusory hypotheses." The district court relied on two District of Columbia Circuit decisions, *Ray v. Turner*, 587 F.2d 1187 (1978), and *Vaughn v. Rosen*, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977 (1974). The *Vaughn*-court's reliance upon the affidavit method is in turn based upon *EPA v. Mink*, 410 U.S. 73, 93 (1973), an FOIA case in which this Court observed that an "agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the district court that the documents sought fall clearly beyond the range of material . . . [subject to disclosure]."

The utilization of the affidavit method in Sunshine Act cases is entirely appropriate because the Act is very closely modeled on the FOIA. The two statutes are in fact so closely related as to be *in pari materia.* Consequently, although the dearth of Sunshine Act cases makes recourse to FOIA precedent *necessary*, such a reliance upon FOIA cases will also *suffice* to support Ehm's contention that a detailed justification specifically identifying the Amtrak director's reasons in support of their official position that the Act does not apply to them is a minimal requirement.

A pivotal provision of the FOIA that is often disregarded by litigants and courts alike is subsection (c), which provides that the Act "does *not* authorize withholding of *information* or limit the availability of records to the public, *except* as specifically stated in [section 552]" (emphasis added). 5 U.S.C. §552(c). This provision has consistently been interpreted

by the courts to mean that a district court possesses no authority to permit the withholding of information, materials, and records required to be disclosed pursuant to paragraphs (a)(1) to (3) of the Act, unless withholding is expressly authorized by the nine narrow exemptions of subsection (b).

The only FOIA case in which this Court took judicial notice of subsection (c) appears to be *EPA v. Mink*, 410 U.S. 73, 79 (1973), the Court noting that the nine exemptions created by the Act "are explicitly made exclusive . . . and are plainly intended to set up concrete, workable standards for determining whether particular materials may be withheld or must be disclosed." There is, consequently, little doubt that the trial court erred in permitting Amtrak to evade publication in the *Federal Register* of the notices and rules at issue because a "district court has no equitable jurisdiction to permit the withholding of information which does not fall within one of the [FOIA's] exemptions." *Sears, Roebuck and Co. v. GSA*, 384 F.Supp. 996, 1003-1004 (D.D.C.), *aff'd*, 509 F.2d 527 (D.C. Cir. 1974). *Accord, American Civil Liberties Union v. Brown*, 609 F.2d 277, 280 (7th Cir. 1979); *Getman v. NLRB*, 450 F.2d 670, 672, 679, (D.C. Cir. 1971), 16 A.L.R. Fed. 499 (1973); *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971).

By permitting the trial court to disregard the mandate of the FOIA and the Sunshine Act that the burden is on the agency to sustain its action and by allowing it to decline to function as the statutorily designated enforcement arm of these two disclosure laws, the court of appeals has rendered a decision in conflict with a number of decisions of other federal courts of appeals on the same matter, has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and has, furthermore, decided an important question of federal law which has not been, but should be, settled by this Court.

II.

Certiorari Should Be Granted Because the Lower Court's Finding that Amtrak is not Required to Comply with the FOIA's *Federal Register* Publication Mandates Contradicts Fourteen Decisions of Other Federal Courts of Appeals and One Applicable Decision of this Court

The FOIA's five *Federal Register* publication mandates, 5 U.S.C. § 552(a)(1)(A)-(E), are not, as Amtrak claims, provisions that were first enacted in 1966 as part of the Act, but were in fact enacted in 1946 in substantially identical form as part of section 3, the "public information" section, of the Administrative Procedure Act. Professor K. Davis observed recently that agencies' departures from the congressional intent embodied in the FOIA's (a)(1) disclosure mandates are widespread and that judicial insistance upon compliance could substantially raise the quality of administrative justice. 1 Administrative Law Treatise § 5.10 (Supp. 1982). The validity of this observation is supported in part by the fact that only three of the ten "mixed-ownership Government corporations" so designated in 31 U.S.C. 9101, the current Government Corporation Control law, have published the implementing rules mandated by the Freedom of Information, Privacy, and Government in the Sunshine Acts. Some of these government corporations were already in existence in 1946; Amtrak commenced operations on May 1, 1971.

In support of his contention that Amtrak must comply with *all* of the FOIA's "publication" mandates, Ehm cited all the authorities that he was able to find, including thirteen reported trial court decisions, eleven decisions rendered by the District of Columbia Circuit, fourteen rendered by other circuits, and one by this Court. Both the trial and appellate court simply disregarded these case authorities, which action—the petitioner respectfully suggests—constitutes an improvident exercise of judicial discretion and soundly defeats the congressional purposes of the Freedom of Information Act.

This Court noted in at least four cases that the FOIA requires agencies to currently publish in the *Federal Register* the five classes of "information" broadly described by subsections 552(a)(1)(A) through (E): *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 352 (1979); *NLRB v. Sears, Roebuck &Co.*, 421 U.S. 132, 136 (1975); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 12 (1973); *Morton v. Ruiz*, 415 U.S. 199, 232-233, 235-236 (1974). *Morton* —the authority primarily relied upon by Ehm in seeking a writ—pertains mainly to the publication of "substantive" or "legislative-type" rules as prescribed by subsection 552(a)(1)(D), the court holding in effect that such rules *must* indeed be published in the *Federal Register*.

The rules expressly mandated by subsec. (g) of the Sunshine Act to be published in the *Federal Register*—"regulations to implement the requirements of subsections (b) through (f)" of the Act—are unquestionably "substantive rules" of the type described by subsection (a)(1)(D) of the FOIA, and must, for this reason, be so published. It should be noted, however, that the traditional differentiation between so-called procedural, substantive, and interpretative rules was set aside by the Court in 1968 in favor of the much more reliable and practical "substantial impact" standard. *See Nat'l Motor Freight Traffic Association v. United States*, 268 F.Supp. 90, 93, 95-97, (D.D.C. 1967) (3-judge court), *aff'd mem. per curiam*, 393 U.S. 18 (1968). All of the rules and notices at issue in this litigation are clearly matters that substantially impact the public or certain classes of the public.

The notices required by 45 U.S.C. § 564(c)(1)(E) to be published in accordance with the procedures set out in 5 U.S.C. § 553—notices of "opportunity to be heard" also required by 44 U.S.C. § 1508 to be so published—are undeniably matters that have "a ponderable impact upon interests of substance" of the persons that would be directly affected by a change in rail passenger service, and must, therefore, be published in the *Federal Register* pursuant to the provisions of subsection (a)(1)(D) of the FOIA.

The situation is no different in respect to the "meeting

notices" required to be published in the *Federal Register* by subsection (e)(3) of the Sunshine Act. These, too, are obviously notices that substantially impact a particular class of persons, if not the public as a whole, and constitute, moreover, matters specifically required to be so published by subsection (a)(1) of the FOIA. The interests of the substantially affected persons need not be of a specific kind; an interested party's desire to simply observe a formal meeting of the Amtrak board may suffice because the Act grants the right of access to the proceedings of a "collegial body" to *any* person. 5 U.S.C. § 552b(b), (g), and (h). But how can an individual attend, *if* an agency such as Amtrak refuses to give formal notice of the time and place of the meetings of its managing board of directors?

The court of appeals inexplicably affirmed the trial court's dismissal of the suit on the ground that Ehm's "[FOIA] request did not seek the release of information, [but] appears in reality to have been an attempt to compel Amtrak to engage in informal Administrative Procedure Act rulemaking." Appendix A, *infra*, at p. A-1. As lower courts have correctly pointed out, and as this Court has hinted at in *Chrysler Corp. v. Brown*, 441, U.S. 281 (1979), and *NLRB v. Wyman-Gordon Co.* 394 U.S. 759 (1979), an FOIA request for category (a)(1) information—the five types of matters required to be published in the *Federal Register* by section (a)(1) of the Act—must of necessity be combined with a petition for rule-making under 5 U.S.C. § 553(e), and vice versa. An example of an exception to this rule might be a request that the agency publish the "descriptions of its central and field organization," as required by subsection 552(a)(1)(A)—information, which Amtrak, incidentally, has also declined to publish until now. The nature of such "information" is necessarily dictated by the pertinent agency's actual structure, and constitutes, moreover, an "order" as defined in 5 U.S.C. § 551(6), alleviating, thereby, the need for a petition for rule-making.

The same is true of the Sunshine Act "meeting notices" required by subsection 552b(e)(3) and the notices of opportunity to be heard mandated by 45 U.S.C. § 564 (c)(1)(E). But it is not true of the procedural and substantive rules expres-

ly mandated by subsection (g) of the Sunshine Act and subsection 564(c)(1)(E) of the RPSA, although it can be said that a petition for rule-making should not become necessary in these two instances because the promulgation of these rules is already mandated by an act of Congress. In short, there should be no occasion for a citizen to petition an agency for the promulgation of rules that are required to be issued by the express language of a statute.

The appellate court's affirmation of the trial court's dismissal of Ehm's FOIA suit on the ground that his original request to the agency did not constitute a valid FOIA request, but rather a petition for rule-making, constitutes not only a misapprehension of the law, but also contradicts the same court's previous finding that compliance with 5 U.S.C. § 552(a)(1)(D) implies compliance with 5 U.S.C. § 553(b), and vice versa. *Cabais v. Egger*, 527 F. Supp. 498, 504 n. 13 (D.D.C. 1981).

In summary then, because the court of appeals for the District of Columbia Circuit has rendered a decision in conflict with at least fourteen decisons of other federal courts of appeals, has decided a federal question in a way in conflict with an applicable decision of this Court, and has so far sanctioned a departure by a trial court from the usual course of judicial procedure as to call for an exercise of the Court's power of supervision, the petition for writ of certiorari should be granted.

III.

Certiorari Should Be Granted to Uphold this Court's Well-Settled Rule that Repeals by Implication Are not Favored

In 1981 the Congress altered the size and nature of Amtrak's board by reducing the number of directors actually appointed by the President, with the advice and consent of the Senate, from eight to three, but at the same time authorized the Secretary of Transportation to appoint two members to

the board. The peculiar result of this new arrangement is that, even though Amtrak is *de jure* a stock company, to wit a "mixed-ownership Government corporation" organized under the District of Columbia Business Corporation Act, 1) the four private part-owners of Amtrak are no longer represented on the governing board, 2) the United States, the owners of 95.7 percent of Amtrak's capital stock, are represented by the two Department of Transporation appointees only, and 3) the other seven Amtrak directors do not represent any stockholders directly and possess, consequently, no authority to vote any shares.

The legislative history of section 1174 (a) of Pub. L. No. 97-35, 95 Stat. 689 (Aug. 13, 1981), contains nothing that would suggest even remotely that its authors were in any way aware that their action would directly affect the applicability provision of the Government in the Sunshine Act or that the Amtrak directors would promptly utilize newly revised 45 U.S.C. 543(a) as their legal authority to discontinue compliance with the federal "open meeting" law. It is, furthermore, established that Amtrak's two congressional oversight committees, the respective Commerce Committees, possess no lawmaking and oversight authority whatsoever over such "across-the-board" statutes as the Sunshine Act or the APA, both of which lie exclusively within the legislative province of other committees.

The cardinal rules of statutory construction, that "repeals by implication are not favored" and that "the intention of the legislature to repeal a prior law must be clear and manifest," can be traced in the decisions of this Court as far as *Wood v. United States*, 41 U.S. [16 Pet.] 342, 363 (1842), in which the Court held that a previous law remains in force *unless* a "positive repugnancy" exists between the new law and the old. The Court upheld this doctrine in at least fourteen subsequent cases, two relatively recent ones being *Administrator, FAA v. Robertson*, 422 U.S. 255, 266 (1974), and *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-134 (1974), in both of which the Court quoted *Morton v. Mancari*, 417 U.S. 535, 551 (1974), to the effect that "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent

a clearly expressed congressional intention to the contrary, to regard each as effective."

As can easily be shown, nothing whatsoever in the actual language of current subsection 543 (a) of title 45 indicates affirmatively any congressional intent to exempt Amtrak from the applicability of the Sunshine Act in general and the two pertinent definitions of the term "agency" in particular. Because Amtrak cannot affirmatively show congressional intention to repeal 5 U.S.C. § 552(e) and § 552b(a)(1), and because 45 U.S.C. § 543(a) and the Sunshine Act are in no respect irreconcilable, this Court should adhere to its traditional holding, enunciated in *United States* v. Borden Co., 308 U.S. 188, 198 (1939), that "[w]hen there are two acts upon the same subject, the rule is to give effect to both, if possible." There is, in short, no reason whatsoever for the Court to depart from the long-established and entirely logical rule that *direct language is always required to invalidate an existing statutory provision.*

Because the lower court has decided a federal question in a way that is in conflict with no less than fifteen applicable decisions of this Court and has so far sanctioned a departure by a trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers, the application for a writ of certiorari should be granted.

IV.

Certiorari Should Be Granted to Prevent the Setting of a Deleterious Precedent in Respect to the Force and Effect of 31 U.S.C. § 3526

The practice of bestowing upon decisions of the Comptroller General the force and effect of law has been in effect for almost 100 years, the oldest pronouncement on the subject being a 1895 ruling by the Attorney General. 21 Op. Att'y Gen. 178. The question whether or not an executive agency may lawfully disregard 31 U.S.C. § 3526(d), which provides

for the conclusiveness and finality of Comptroller General's decisions on the executive branch of the federal government, has apparently not come before this Court directly, but was dealt with in passing in at least four cases: *Real Estate Savings Bank of Pittsburgh v. United States*, 16 Ct. Cl. 335, 352 (1880), *aff'd*, 104 U.S. 728, 733 (1881); *Miguel v. McCarl*, 291 U.S. 442, 445-456 (1934); *Pettit v. United States*, 203 Ct. Cl. 207, 448 F.2d 1026, 1031 (1973), *disapproved on other grounds sub nom. United States v. Testan*, 424 U.S. 392 (1975), *motion denied*, 425 U.S. 957 (1976); *Greene County Planning Board v. FPC*, 559 F.2d 1227, 1234 (2nd Cir.), *cert. denied*, 434 U.S. 1086 (1976).

Whereas the courts possess full authority to revise a decision of the Comptroller General that is clearly contrary to law, *Miguel*, *supra*, 291 U.S. at 456, and *Greene*, *supra*, 559 F.2d at 1234, they possess no authority to disregard congressional will as reflected in the plain language of a statute. By disregarding the Comptroller General's finding, in decision B-114829, that Amtrak *is* an "agency" for the purposes of the Sunshine Act and that the Act's legislative history clearly indicates congressional intent to include Amtrak, the trial court contravened the express mandate of 31 U.S.C § 3526(d) that *all* decisions of the Comptroller General be binding and conclusive on the executive branch of the government. The court cannot do so, however, because it is always the duty of the courts "[to] obey the mandate of the law." *The Antelope*, 23 U.S. [10 Wheat.] 67, 114 (1825).

"There is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature, or no," held this Court in *Calder v. Bull*, 3 U.S. [3 Dall.] 386, 399 (1798), citing Blackstone verbatim, and in *Maxwell v. Moore*, 63 U.S. [22 How.] 185, 191 (1859), the Court admonished that "where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so." The trial court violated this imperative when it reached a finding directly opposite to that of the Comptroller General and disregarded the plainly expressed intent of Congress that all

decisions of the Comptroller General be "binding and conclusive." 21 Op. Att'y Gen. 188 (1895).

The "evident and express words" of 31 U.S.C. § 3526 and its predecessors, 31 U.S.C. §§ 44 and 74, are that all decisions of the Comptroller General shall be "conclusive on the executive branch." By exempting the Amtrak board of directors from the operation of this express statutory provision, the court in effect contravened the intent of Congress and violated the cardinal rule of statutory construction that, where the will or intention of the lawmaking power is declared in plain and unequivocal terms, such will or intent *must* be absolutely followed. *Binns v. Lawrence*, 53 U.S. [12 How.] 9, 17 (1851).

Mandamus has traditionally issued in response to abuses of judicial power. Thus, where a district judge refuses to take some action that he is required to take or takes some action that he is not empowered to take, mandamus will lie. *Bankers Life & Casualty Co. v. Holland, Chief Judge*, 346 U.S. 379, 382 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S 21, 26 (1942). Because Congress imposed upon the trial court the duty to uphold the conclusiveness of Comptroller General's decisions and the rights of the public depend on the performance of that judicial act, it would have been appropriate for the lower court to use the writ in aid of its appellate jurisdiction. The lower court's erroneous decision is, however, reviewable by this Court by writ of certiorari, for which reason the petitioner abstained from resorting to that remedy.

If this Court were to allow the court of appeals to sustain the district court's disregard of the express mandate of 31 U.S.C § 3526(d), it would permit the setting of a dangerous precedent that could possibly hinder the work of the Government Accounting Office. The GAO was duly made aware of the fact that the district court had in effect declared section 3526(d) *inoperative* in respect to Amtrak, but apparently was not alarmed and took no corrective action, although it must be admitted that this decision is entirely within the Comptroller General's discretion. Nevertheless, the trial court's action sets a dangerous and deleterious precedent that should not be allowed to stand.

In summary, because the court of appeals, by approving an action by a district court that is not consonant to right

and justice, has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, the petition for a writ of certiorari should be granted.

CONCLUSION

Wherefore, the petitioner respectfully prays that a writ of certiorari be granted.

Alfred E. Ehm, *pro se*
170 Carousel Drive
San Antonio, Texas 78227
512/673-8982

AFFIDAVIT OF SERVICE BY MAIL

STATE OF TEXAS)

COUNTY OF BEXAR)

I, Alfred E. Ehm, depose and say that I am the petitioner herein and that, pursuant to Rule 28.5(c) of the Rules of the Supreme Court, I served three copies of the foregoing petition on each of the parties required to be served herein, by mailing such copies, postage prepaid to the individual shown at his office address, on August 4, 1984:

(1)	National Railroad Passenger Corporation, the Respondent, 400 N. Capitol Street Washington, DC 20001	Christopher M. Kline Deputy General Counsel and Counsel of Record
(2)	The Solicitor General U.S. Department of Justice Washington, DC 20530	same

All parties required to be served have been served.

/s/ Alfred E. Ehm
Alfred E. Ehm

Sworn to and subscribed before me on July 23, 1984.

/s/ Linda Murray
Linda Murray, Notary Public
State of Texas

[seal]

My commission expires on March 19, 1985.

APPENDIX

Nos. 83-1752 & 83-1852

MEMORANDUM

These are appeals from two separate orders of the District Court. In No. 82-1752, Alfred Ehm appeals from the dismissal of a Freedom of Information Act ("FOIA") lawsuit brought against the National Railroad Passenger Corporation ("Amtrak"). In No. 83-1852, Ehm appeals from the District Court's order dismissing a separate Sunshine Act lawsuit against Amtrak. We conclude that neither appeal is meritorious and therefore affirm both judgments.

The District Court dismissed appellant's FOIA lawsuit on the ground that appellant had failed to exhaust his administrative remedies. We need not decide the correctness of this holding; instead, we rest our affirmance upon an even more fundamental defect infecting appellant's lawsuit. Appellant's purported FOIA request appears in reality to have been an attempt to compel Amtrak to engage in informal Administrative Procedure Act rulemaking concerning the establishment of an auto-ferry service between Virginia and Florida. Because his request did not seek the release of information, appellant cannot now be heard to maintain that Amtrak improperly withheld agency records. His complaint would properly have been dismissed on this threshold basis. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 ("federal jurisdiction [under FOIA] is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records' ").

The appeal in No. 83-1852 must also fail. Appellant's claim in this case was brought under the Sunshine Act, which by its terms applies only to government agencies "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such positions by the President with the advice and consent of the Senate . . . ." 5 U.S.C. § 552b(a)(1); *see Symons v. Chrysler Corp. Loan Guarantee Board*, 670 F.2d 238, 240 (D.C. Cir. 1981). The board of directors governing Amtrak is composed of nine members, only three of whom are appointed to their board positions by the President with the advice and consent of the Senate. *See* 45 U.S.C. § 543(a)(1). Thus, Amtrak is not subject to the Sunshine Act.

The only issue left to be resolved is whether appellant should be penalized for bringing these frivolous appeals. *See* Fed. R. App. P. 38. While recognizing that appellant was not represented by counsel, we note that other courts have in appropriate cases penalized *pro se* litigants for bringing frivolous appeals. *See, e.g., Parker v. Commissioner of Internal Revenue*, 724 F.2d 469, 472 (5th Cir. 1984); *Collins v. Amoco Production Co.*, 706 F.2d 1114, 1115 (11th Cir. 1983); *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980). We agree with the Seventh Circuit that imposition of penalties against a *pro se* litigant will generally be appropriate if the appeal was frivolous and if it was brought in bad faith. *See Ruderer*, 614 F.2d at 1132. There is no question that these appeals were frivolous. Furthermore, there is at least some indication that these appeals are part of a series of harassing lawsuits brought by appellant against Amtrak. *See* Brief for Appellee in No. 83-1852, at 5 (appellant presently has at least four other federal court lawsuits pending against Amtrak). We are hesitant to make a finding of bad faith, however, on this record. While we therefore decline to penalize appellant for bringing the present appeals, we sound a cautionary note that frivolous appeals will not go unsanctioned in the future.

The District Court's orders are affirmed, and ordinary costs are awarded to Amtrak. *See* Fed. R. App. P. 39(a); D.C. Cir. Rule 15.

[Filed March 23, 1984]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFRED E. EHM,

Plaintiff,

v.

Civil Action No. 83-0969

NATIONAL RAILROAD
PASSENGER CORPORATION

Defendant.

ORDER

Upon consideration of defendant's motion to dismiss, plaintiff's opposition, the memoranda submitted by the parties, oral arguments by defendant's counsel, plaintiff having decided not to appear, and the entire period, it is by the Court this 6th day of June, 1983

ORDERED that defendant's motion to dismiss is granted due to plaintiff's failure to exhaust his administrative remedies.

/s John Lewis Smith, Jr.
United States District Judge

[Filed June 7, 1983]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALFRED E. EHM,

Plaintiff,

v. Civil Action No. 83-1316

NATIONAL RAILROAD
PASSENGER CORPORATION,

Defendant.

ORDER

Upon consideration of defendant's motion to dismiss, plaintiff's opposition, and the entire record, the Court finds that defendant is not subject to the provisions of the Sunshine Act, 5 U.S.C. section 552b. Accordingly, it is by the Court this 25th day of July, 1983

ORDERED that defendant's motion to dismiss is granted and this action is dismissed with prejudice.

/s/ John Lewis Smith, Jr.
United States District Judge

[Filed July 25, 1983]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1752 September Term, 1983

Alfred E. Ehm, Civil Action No. 83-00969
Appellant
v.

National Railroad Passenger Corporation

No. 83-1852

Alfred E. Ehm, Civil Action No. 83-01316
Appellant
v.

National Railroad Passenger Corporation

Before: Wright, Bork and Starr, Circuit Judges

JUDGMENT

These appeals from two separate orders of the United States District Court for the District of Columbia were briefed by both parties. We have accorded full consideration to the issues presented; they occasion no need for an opinion. *See* D.C. Cir. Rules 11(d), 13(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED that the judgments from which these appeals have been taken are affirmed. It is

FURTHER ORDERED by this Court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 14, as amended on November 30, 1981, and June 15, 1982.

Per Curiam
For The Court

/s/ George A. Fisher
Clerk

[Filed March 23, 1984]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1752 September Term, 1983

Alfred E. Ehm, Appellant Civil Action Number 83-00969

v.

National Railroad Passenger Corporation

And Consolidated Case No. 83-1852

BEFORE: Wright, Bork and Starr, Circuit Judges

ORDER

On consideration of the Petition for Rehearing of Appellant, filed March 23, 1984, it is

ORDERED that the aforesaid Petition for Rehearing is denied.

Per Curiam
For the Court:

GEORGE A. FISHER, Clerk

BY:
/s/ Robert A. Bonner
Chief Deputy Clerk

[Filed May 9, 1984]

Freedom of Information Act (FOIA), 5 USC § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

* * * * *

(e) For purposes of this section, the term "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Government in the Sunshine Act, 5 U.S.C. § 552b

§ 552b. Open meetings

(a) For purposes of this section—

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

* * * * *

(e)

* * * * *

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

* * * * *

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the

Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

Federal Register Act, 44 U.S.C. § 1501 et seq.

* * * * *

§ 1505. Documents to be published in Federal Register

(a) Proclamations and Executive Orders; documents having general applicability and legal effect; documents required to be published by Congress. There shall be published in the Federal Register —

(1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof;

(2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and

(3) documents or classes of documents that may be required so to be published by Act of Congress.

For the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect.

(b) Documents authorized to be published by regulations; comments and news items excluded. In addition to the foregoing there shall also be published in the Federal Register other documents or classes of documents authorized to be published by regulations prescribed under this chapter with the approval of the President, but comments or news items of any character may not be published in the Federal Register.

* * * * *

§ 1508. Publication in Federal Register as notice of hearing

A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress, or which may otherwise properly be given, shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, when the notice is published in the Federal Register at such a time that the period between the publication and the date fixed in the notice for the hearing or for the termination of the opportunity to be heard is —

(1) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of Congress; or

(2) not less than fifteen days when time for publication is not specifically prescribed by the Act, without prejudice, however, to the effectiveness of a notice of less than fifteen days where the shorter period is reasonable.

* * * * *

§ 1510. Code of Federal Regulations

(a) The Administrative Committee of the Federal Register, with the approval of the President, may require, from time to time as it considers necessary, the preparation and publication in special or supplemental editions of the Federal Register of complete codifications of the documents of each agency of the Government having general applicability and legal effect, issued

or promulgated by the agency by publication in the Federal Register or by filing with the Administrative Committee, and are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions, and are in effect as to facts arising on or after dates specified by the Administrative Committee.

* * * * *

(e) The codified documents of the several agencies published in the supplemental edition of the Federal Register under this section, as amended by documents subsequently filed with the Office and published in the daily issues of the Federal Register, shall be prima facie evidence of the text of the documents and of the fact that they are in effect on and after the date of publication.

Rail Passenger Service Act (RPSA), 45 U.S.C. § 501 et seq.

§ 564. Service changes

* * * * *

(c)(1) . . . [The criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services] shall include, but need not be limited to—

* * * * *

(E) methods for giving public notice of, and obtaining public comments on, any such addition or discontinuance;

31 U.S.C. § 3526

§ 3526. Settlement of accounts

(a) The Comptroller General shall settle all accounts of the

United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government.

* * * * *

(d) On settling an account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government. On the initiative of the Comptroller General or on request of an individual whose accounts are settled or the head of the agency to which the account relates, the Comptroller General may change the account within a year after settlement. The decision of the Comptroller General to change the account is conclusive on the executive branch.

Comptroller General Decision B-114829
57 Comp. Gen. 773 (1978)

National Railroad Passenger Corporation— Applicability of Freedom of Information, Privacy and Sunshine Acts

The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak.

Federal Register—Publication—Required

Government Printing Office is required by 44 U.S.C. 1504 (a)(3) to publish information in Federal Register that Amtrak is required to publish under Freedom of Information, Privacy, and

Sunshine Acts. Furthermore, Amtrak may be billed for such publication in accordance with 44 U.S.C. 1509, as amended by Pub. L. No. 95-94, since Amtrak is an "agency" within the context of that provision.